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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

HUEY R. LEE, JR., BY HIS NEXT FRIEND, L. D. TURBERVILLE,

Petitioner,

VS.

THE STATE OF ALABAMA.

NO.....

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ALABAMA.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Huey R. Lee, Jr., by his next friend, L. D. Turberville, submits herewith his petition praying that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Ala-

bama, rendered June 27th, 1946, denying petitioner leave to file a petition for writ of error coram nobis in the Circuit Court of Barbour County, Alabama, application for rehearing thereon being overruled and denied August 2nd, 1946.

Petitioner prays that a writ of certiorari issue to review said judgment and decision of the Supreme Court of the State of Alabama, and in support of this petition respectfully shows to this Honorable Court as follows:

STATEMENT.

The record in this case shows that petitioner, Huey R. Lee, Jr., was arrested on July 6th, 1942, and confined in jail at Clayton, Barbour County, Alabama, charged with murder in the first degree in connection with the death on that date of his father, Huey R. Lee, Sr. The question of the petitioner's insanity arose almost immediately and appeared continuously all through the proceedings in the case of The State of Alabama Vs. Huey R. Lee, Jr. On July 13th, 1942, a week after arrest, it was alleged that said Huey R. Lee, Jr. was insane and request was made that a jury be empannelled, as provided by Title 15, Section 428, Code of Alabama 1940, to pass upon this question. Such sanity inquisition was duly held, in the Circuit Court of Barbour County, Alabama, on July 20th, 1942, and a jury found petitioner to be sane.

Thereafter, on October 20th, 1942, the grand jury of Barbour County, Alabama, returned an indictment against said Huey R. Lee, Jr., charging him with murder in the first degree. Two days later, on October 22nd, 1942, R. P. Williams, Sheriff of Barbour County, Alabama, made a written report to the Hon. J. S. Williams, Judge of the Circuit Court of Barbour County, Alabama, stating that said Huey R. Lee, Jr. was confined by him in the jail of Barbour County, Alabama, under

an indictment charging him with murder in the first degree, said report further stating, "I have reasonable grounds to believe that the defendant, Huey Lee, Jr., was insane at the time of the commission of said offense and that he is insane now, and that proper inquiry should be made as to his sanity or Insanity." Along with the report of the sheriff, there was filed with said Court a statement by Dr. W. D. Partlow, superintendent of the Alabama State Hospital for the insane, who had made a study of the defendant. In his report to the Court, Dr. Partlow stated, "It is my professional opinion there is reasonable ground to believe that said defendant was insane either at the time of the commission of the offense charged in said indictment, or presently". On October 23rd, 1942, Judge Williams, the said Circuit Judge of Barbour County, made an order for the removal of Huey R. Lee, Jr. to the Alabama State Hospital for Insane, for observation, under the provisions of section 425, Title 15, Code of Alabama 1940. Said order contains these words, "and it appearing from said report and from petition filed on behalf of said Huey R. Lee that there is reasonable ground for believing that said Huey R. Lee is presently insane or was insane at the time of the commission of the alleged murder."

Petitioner was confined in the Alabama State Hospital for the Insane, for observation by a lunacy commission, from October 24th, 1942, until July 28th, 1943, a period of over nine months. Under the provisions of Section 425, Title 15, Code of Alabama 1940, a lunacy commission composed of Dr. W. D. Partlow, superintendent of the Alabama State Hospital for the Insane, Dr. J. S. Tarwater, and Dr. P. B. Mayfield, members of the medical staff of said institution, made a study during this nine months to determine the sanity of petitioner, and under date of July 21st, 1943, filed their report with the Clerk of the Circuit Court of Barbour County, Alabama, as provided by said statute. This report states, "It is the opinion of each of us, and it is

our opinion jointly and collectively, that the said Huey R. Lee, Jr., at the time of his admission to the Bryce Hospital, Tuscaloosa, Alabama, which is one of the Alabama State Hospitals, on October 24th, 1942, was insane, and that at all times continually from the date of admission to the present date of this report has been insane." The report further states, "It is our further opinion that his mental condition as described above existed prior to his admission to The Bryce Hospital and prior to and at the time of the commission of the crime to the extent that it did affect his criminal responsibility at the time of the commission of the crime."

On receipt of the report, the Circuit Clerk ordered the sheriff of Barbour County to remove said Huey R. Lee, Jr. from The Bryce Hospital to the county jail of Barbour County, to be held there pending disposition of the charge against him. The removal was made on August 3rd, 1943. On October 21st, 1943, petitioner was arraigned, and to the indictment interposed the following pleas: (1) not guilty; (2) not guilty by reason of insanity; and (3) not guilty by reason of insanity at the time of the commission of the offense. The cause was called for trial on October 27th, 1943, in the Circuit Court of Barbour County, Alabama, with Hon. J. S. Williams presiding, the same judge who had made the order removing defendant to the State Hospital for Insane for observation by the lunacy commission. In stating the case to the jury empannelled to try the case, one of the attorneys for defendant said, "the defendant pleads not guilty; that he was not guilty by reason of insanity, and that plea put in issue the fact whether or not, as we in our language sometime express it, a man was insane and incapable of committing crime, and under the Alabama law, did not commit any crime, and in this case, we say he is not guilty and not guilty by reason of insanity". Thereupon the trial court said, "You mean to say to the jury that he was insane at the time of the commission of the offense". Defendant's

attorney replied, "We do not want to differ with the Court, and we plead as suggested by the Court that he was insane at the time of the commission of the offense." Although the report of the lunacy commission had been filed with the court a short time before the trial, no inquiry was made into the present sanity of defendant, as provided by Section 426, Title 15, Code of Alabama 1940. Not only was no inquiry made as to defendant's sanity at the time of the trial, but the court, as shown above, limited and confined the issue of insanity to the time of the commission of the offense. Defense counsel, through gross negligence or incompetence, failed to insist upon an inquiry as to the present sanity of defendant, and failed to reserve an exception to the action of the court in so limiting the issue of insanity to the time of commission of the offense.

The jury returned a verdict finding the defendant guilty as charged in the indictment and fixed his punishment at life imprisonment in the penitentiary. Motion for new trial was filed in the Circuit Court of Barbour County, Alabama, and the same was overruled and denied by the Court. Appeal was duly taken to the Supreme Court of Alabama, and on December 29th, 1944, judgment of the trial court was affirmed. Application for rehearing of the case was filed on Dec. 29th, 1944, and the same was overruled on January 25th, 1045. Petitioner then filed application for writ of error in the Supreme Court of Alabama, which was denied by said Court on April 2nd, 1945. Petitioner then filed petition for writ of certiorari in the Supreme Court of the United States to review said judgement and decision of the Supreme Court of Alabama, which writ was denied to him on June 18, 1945. Thereafter, petitioner filed in the Supreme Court of Alabama, his petition for leave to file, in the Circuit Court of Barbour County, Alabama, his petition for writ of error coram nobis, based upon his insanity at the time of his trial, the failure of the trial court to inquire into said condition, and the

action of the trial court in limiting and confining the issue of insanity to the time of the commission of the offense. The petition also contained a general prayer for relief, including the writ of habeas corpus, if petitioner was mistaken in his remedy, so as to be able to show and present the fact of his insanity at the time of his trial. This petition was denied on June 27th, 1946, and petitioner's application for rehearing was denied and overruled on August 2nd, 1946.

The Supreme Court of Alabama, in its decision, held and ruled that in a proper case, the writ of error coram nobis may afford a remedy for relief to an insane person who is convicted without the fact of insanity having been brought to the attention of the trial court, where the circumstances surrounding the case disclose that the defendant was prevented from having the issue raised and presented. In spite of the fact that an insane person cannot protect his own rights; that his counsel wilfully or negligently failed to protect them for him; that the trial court failed in its duty to hold an inquriy into the question of defendant's sanity at the time of trial, although the record shows that such court had probable, substantial and convincing cause for believing him to be insane; and that the trial court directed that the issue of insanity be limited to the time of the commission of the offense; the Supreme Court of Alabama somehow reached the conclusion this was not a case where the defendant was prevented from having the issue of his insanity at the time of trial raised and presented. Said Court refused to hold and rule that the failure of the trial court to inquire into the matter of the insanity of defendant at the time of trial, as provided by Section 426, Title 15, Code of Alabama, 1940, or to submit that issue to a jury, resulted in putting defendant to trial while insane, and thus denied him "due process of law". Said court denied to petitioner the issuance of the writ of error coram nobis or, in the alternative, the writ of habeas corpus, so that this constitutional right of petitioner could be inquired into.

The Federal questions presented by the petition were presented to the Supreme Court of the State of Alabama, insisted upon, and claim of petitioner to said Federal right was denied, and petitioner was barred from presenting the question of whether he was tried, convicted, sentenced and imprisoned in the penitentiary while insane.

JURISDICTION.

Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. Sec. 344, in that petitioner was and is deprived of his liberty by the State of Alabama, without due process of law, contrary to the provisions of Amendment 14, Section 1, of the Constitution of the United States.

REASON FOR GRANTING WRIT.

(a) The Supreme Court of Alabama has denied to this petitioner a right guaranteed to him by the 14th and 5th Amendments to the Constitution of the United States, viz: the right to show that he was deprived of his liberty without due process of law in that he was placed on trial, convicted, adjudged guilty and sentenced while insane.

(b) In denying his petition for leave to file, in the Circuit Court of Barbour County, Alabama, a petition for writ of error coram nobis, the Supreme Court of Alabama denied to petitioner his right to show that he was insane at the time of his trial, and that for this reason he is being deprived of liberty without due process of law, contrary to the 14th and 5th Amendments, to the Constitution of the United States.

(c) In denying his alternative prayer for issuance of the writ of habeas corpus, the Supreme Court of Ala-

bama denied the petitioner the right to show that he was insane at the time of his trial, and for that reason, he is being deprived of liberty without due process of law, contrary to the 14th and 5th Amendment to the Constitution of the United States.

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Alabama, commanding that court to certify and send to this court for review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the case numbered and styled on its docket "No. 398, Fourth Division, Ex Parte: Huey R. Lee, Jr., pro ami," for the right to file a petition in the Circuit Court of Barbour County, Alabama, for a writ of error coram nobis, that same may be reversed by this Honorable Court.

And petitioner prays for such other, further and different relief in the premises as this Honorable Court may deem meet and just.

Respectfully submitted,

Samuel M. Johnston, Counsel for Petitioner.

Of Counsel:

C. L. Hybart & R. L. Jones.

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IN THE

SUPREME COURT OF THE UNITED STATES

.....

OCTOBER TERM, 1946

No.....

HUEY R. LEE, JUNIOR.
BY HIS NEXT FRIEND,
L. D. TURBERVILLE, PETITIONER.
VS.
THE STATE OF ALABAMA.

BRIEF AND ARGUMENT

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on Petition for Writ of Certiorari to
the Supreme Court of the State of Alabama.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Alabama, sought to be reviewed, is lengthy and will not be set out here. It will be found in the record and reference to same is hereby made.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 344, in that petitioner was and is deprived of his liberty by the State of Alabama, without due process of law, contrary to the 14th Amendment to the Constitution of the United States. The judgment to be reversed is dated June 27th, 1946, and application for rehearing was overruled and denied August 2nd, 1946.

STATEMENT OF THE CASE.

A detailed statement of the facts in the case, in proper sequence, is set out in the foregoing petition, and the same is adopted here, without repetition. Suffice it to say that petitioner filed his petition in the Supreme Court of Alabama, praying for leave to file in the Circuit Court of Barbour County, Alabama, a petition for writ of error coram nobis. The petition alleged that the petitioner was placed on trial, convicted, adjudged guilty and sentenced by the court while he was insane, and set out in support of this contention all the facts contained in the foregoing petition. It further alleged that the question of petitioner's insanity at the time of trial was not inquired into or determined by the trial court as required by law under the facts set out, and that he was deprived of his liberty without due process of law in being tried, convicted and sentenced, while insane. The petition contained a general prayer for relief, including the issuance of the writ of habeas corpus, should petitioner be in error as to the proper remedy available to him.

An examination of the facts set out in the foregoing petition discloses the substantiality of petitioner's claim to relief. The sheriff of the County, the superintendent of the Alabama State Hospital for the Insane, and the trial judge himself had made reports showing

they all had probable cause for believing petitioner was insane. A lunacy commission, set up under authority of the laws of Alabama, composed of experts, after nine months of observation, examination and study, reported that petitioner was then insane, and had been insane continuously from the date of his admission to the State Hospital for the Insane until the date of the report, which was a short time before the trial. This report, which was entitled to the same weight as a judicial determination of petitioner's insanity, along with the other proof of insanity, was disregarded by the trial court and petitioner was placed on trial in this condition, without further inquiry as to his present mental condition. In fact, the trial court so directed the issues in the case as to limit and confine the question of insanity to the time of the commission of the offense. Petitioner, in his helpless condition, was denied his legal and constitutional rights, in the failure of the trial court to perform its very evident duty of inquiring into the sanity of petitioner at the time of trial.

The Supreme Court of Alabama, by decision rendered June 27th, 1946, denied the petition, both as to issuance of writ of habeas corpus, and as to granting petitioner's prayer for leave to file petition for writ of error coram nobis, thereby foreclosing petitioner's effort to have the question of his insanity at the time of trial inquired into. Application for rehearing was denied by said Court on August 2nd, 1946. This petition is filed for the purpose of reviewing and reversing said judgment and decision of the Supreme Court of the State of Alabama, and securing to petitioner the right to show that he was insane at the time of his trial and that his conviction and sentence were, therefore, without due process of law.

SPECIFICATION OF ERRORS.

The Supreme Court of Alabama erred as follows:

1. In ruling and holding that the petition did not

make a sufficient showing of the substantiality of petitioner's claim to the relief sought.

2. In ruling and holding that petitioner had not been prevented from having the issue of his insanity at the time of trial inquired into and passed upon.

3. In denying the prayer of the petition for leave to file in the Circuit Court of Barbour County, Alabama, a petition for writ of error coram nobis.

4. In refusing to issue a writ of habeas corpus, as prayed for in the general prayer of the petition.

5. In denying to petitioner the right to present to, and have determined by, the Circuit Court of Barbour County, Alabama, his contention that he was insane at the time of his trial, conviction and sentence.

6. In holding and ruling that petitioner was properly and adequately represented by his counsel at the time of his trial.

PROPOSITION OF LAW I.

A person cannot be legally placed on trial while he is insane. When the trial court shall have reasonable ground to doubt the sanity of a defendant, charged with a felony, it is the duty of said Court to suspend the trial of such person for such offense, until inquiry can be made of the present sanity of such defendant. Allowing an insane person to be placed on trial, convicted and sentenced to imprisonment, deprives him of his liberty without due process of law.

Hunt v State, 27 So. 2d 186. (Ala.)
Carter v. State, 21 So 2d, 404. (Miss.)
Hawie v. State, 83 So 158, 121 Miss. 197.
Dexter v. Hall, 82 U. S. 9.

Youtsey v. U. S., 97 Fed. 937.
Peo. v. Farrell, 31 Calif. 676.
Forthoffer v. Swope, 103 Fed. 2nd, 709.
Peo. v. Strauss, 17 NYS. 2nd, 482.
23 C. J. S. 233.
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Ashley v. Pescor, 147 Fed. 2d, 318.
U. S. v. Throckmorton, 98, U. S. 61.
Hilton v. Guyot, 159 U. S. 113, 207.
Freeman v. People, 4 Denio, N. Y. 9, 47 Am Dec. 216.
Peo. v. Perry, 14 Calif 2d, 387. 94 P. 2d, 559.

PROPOSITION OF LAW II.

The writ of error coram nobis is the proper method to raise the question of whether a defendant was insane at the time of his trial, where judgment of conviction and sentence has been affirmed by the highest court of the State, and all rights of appeal have expired.

Johnson v. Williams, 244 Ala. 391.
Ex Parte Lee, 27 So. 2d, 147.
Adler v. State, 35 Ark. 517.
Hydrick v. State, 104 Ark. 43.
Chesser v. State, 92 Fla. 754. 109 So 906.
Hawie v. State, 83 So 158, 121 Miss. 197.
Hysler v. State, 146 Fla. 593. 1. So 2d, 628.

PROPOSITION OF LAW III.

If the writ of error coram nobis was not the proper vehicle by which petitioner should have sought his relief, the petition contained a general prayer for relief, and the Supreme Court of Alabama had authority, by writ of habeas corpus or other process, to grant the re-

lief petitioner sought, and should have exercised that authority to the end that petitioner's liberty be not taken from him without due process of law.

Constitution of Alabama, Art. 6, Sec. 140.
Ex Parte: Chaney, 8 Alabama 424.
State, Ex Rel. v. Speake, Judge, 187 Ala. 428.
29 C. J. 117.

PROPOSITION OF LAW IV.

The failure of defendant's counsel, in the trial court, to insist upon a sanity hearing for petitioner, and to reserve an exception to the ruling of the trial court in limiting and confining the question of insanity to the time of the commission of the offense, either through gross negligence or incompetence, amounted to petitioner not being properly and adequately represented by counsel at the time of his trial for murder, and resulted in his conviction being "without due process of law".

Johnson v. U. S. 110 Fed 2d, 562.
Glasser v. U. S. 315 U. S. 60, 62 Sup Ct Rep. 457.
Powell v. State of Alabama. 53 Sup Ct. Rep. 55.
Coates v. Lawrence, 46 Fed. Supp. 414.
Peo. v. Gardiner, 303 Ill 204, 135 NE 422.

ARGUMENT.

The reasons for granting the writ of certiorari and the specifications of error all raise the question of whether petitioner was denied due process of law, in being tried, convicted and sentenced to imprisonment for life, while he was insane, and for the sake of brevity we will argue them together.

Section 426, Title 15, Code of Alabama 1940, reads as follows:

"Inquisition in certain cases of felony; proceedings. If any person charged with any felony be held in confinement under indictment, and the trial court shall have reasonable ground to doubt his sanity, the trial of such person for such offense shall be suspended until the jury shall inquire into the fact of such sanity, such jury to be impaneled from the regular jurors in attendance for the week or from a special venire, as the court may direct, etc."

This is but a statement of the common law rule that an insane person cannot be placed upon trial. This rule is well stated in Carter vs. State, 21 So. 2d, 404, (Miss) as follows:

"One of the most fundamental and humane requirements of the common law, enshrined in the due process of law provision of our Constitution, is that no one shall be tried for the commission of a crime when he is mentally incapable of making a rational defense, i. e., incapable of remembering and intelligently stating the facts on which his defense rests. This mental condition may be casual, temporary or permanent, and may result from any cause. When it is made to appear in the trial court that the mentality of a defendant in a criminal case is probably of this character, his trial should not be proceeded with until that question has been investigated, and it has been made to appear that he is sufficiently rational for the purposes of his defense. That this be done is not only a fundamental right of the defendant, but is also required by the State's public policy, as expressed in Sec. 14 of its Constitution, which prohibits the depriving of any person of life, liberty, or property except by due process of law."

Another good statement of this proposition is found in Hawie Vs. State, 83 So. 158, 121 Miss. 107, as follows:

"But we have no statute which lays down the procedure in cases where it is made known to the Court that the defendant is insane at the time he is placed upon trial for a felony. But the common law on the subject is clear and must prevail. Blackstone observes:

'If a man in his sound memory commits a capital offense, and, before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If after he be tried and found guilty he loses his senses before judgment, judgment shall not be pronounced, and if, after judgment, he becomes of nonsane memory, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.'"

"A lunatic or person non-compos-mentis has nothing which the law recognizes as a mind, and hence cannot make a contract which may have any efficacy as such and is not amenable to the criminal laws."

Dexter V. Hall, 82 U. S. 9.

"It is fundamental that an insane person can neither plead to an arraignment, be subject to a trial, or after trial, receive judgment, or after judgment, under go punishment."

Youtsey Vs. U. S. 97 Fed. 937.

"Where a person becomes insane after committing a crime, he cannot be tried while in such condition."

16 C. J. 99.

"Neither the statutes nor the common law will permit the trial or the punishment of an insane person and if, at the time of trial, there is reason to believe that the accused is insane, his condition should be investigated by a jury, and if he is found to be insane, the trial should be continued until he regains his sanity."

Peo. Vs. Farrell, 31 Calif. 676.

"The rule at common law (and by statute in capital cases in Alabama) is that if at any time while criminal proceedings are pending against a person accused of a crime, the trial court either from observation or upon suggestion of counsel has facts brought to his attention which raise a doubt of the sanity of defendant, the question should be settled before further steps are taken.

Hunt v. State, 27 So. 2d 186. (Alabama)

"At common law, a person cannot be tried while he is insane because of his helpless condition rendering him incapable of making a proper defense, and this is the rule in the American States."

Forthoffer Vs. Swope, 103 Fed. Rep. 2nd, 709.

"An insane person may not be tried while his insanity continues. If the Court, either before or during the progress of such trial from observation or from pleading or suggestion of counsel, has facts brought to its attention which raise a doubt as to the present condition of defendant's mind, in this respect the question should be determined before another step is taken."

23 C. J. S. 233.

"Where defendant indicted for murder was committed to hospital for observation, and psychiatrists report stated that defendant was so insane as to be incapable of understanding charge against

her, or making her defense, defendant could not be placed on trial."

Peo. Vs. Strauss, 17 NYS 2nd, 482.

"A defendant is entitled to be present at time of trial so as to render assistance to his counsel, and if insane, while he may be physically present he is mentally absent, and his infirmity may be of such a nature as to render him wholly unable to be of any assistance to his counsel."

Ashley v. Pescor, 147 Fed. 2d, 318.

There are many other authorities to the same effect, and it seems to be the universal rule that no person in a state of insanity should ever be placed upon his trial for an alleged crime or made to suffer the judgment of the law. The State of Alabama, by Section 425, Title 15, Code of Alabama 1940, apparently realizing the inability of the average layman to determine properly the question of sanity or insanity of a defendant, set up a much improved system calling for the removal of the prisoner to the Alabama State Hospital for the Insane and the creation of a Lunacy Commission composed of experts to observe and study defendant and determine this serious question.

In this case, the record discloses that within a week after defendant was arrested, the Sheriff of the County reported to the court that he had reason to believe that the defendant was presently insane. Then, at a later date, Dr. W. D. Partlow, M. D., Superintendent of the Alabama State Hospitals filed a written report stating that in his opinion defendant was presently insane. The trial judge, in his order sending defendant to the State Hospital for the Insane for observation, declared that he had reason to believe that the defendant was insane. Then, after nine months observation and study, the lunacy commission, constituted by law for the exact purpose of determining such questions, and speaking,

we submit, with the authority of a judicial determination, reported that said Huey R. Lee, Jr., was insane, had been continuously insane during the entire nine months, and probably was insane before that time. The Alabama statute (Sec. 426, Title 15, Code of Alabama 1940 supra) made it the duty of the trial judge, if he had reasonable ground to doubt the sanity of defendant, to suspend his trial and hold an inquiry into that fact. The judge himself had reported that he had such reasonable grounds to believe the defendant was insane. He had the report of the lunacy commission, which was the highest authority on the subject in Alabama, that defendant was insane. Yet he not only failed in his duty to hold an inquiry into the sanity of the defendant at the time of his trial, but directed the issues of the case so as to confine the question of defendant's insanity to the time of the commission of the offense. All this is set out in petition filed for the right to petition for the writ of error coram nobis, and, we submit, substantially makes out petitioner's claim to relief. The record does not look good. At least there was a prima facie case made out of defendant's insanity at the time of trial. Why did the judge fail in his duty, imposed by law, to have this question inquired into? The failure to do so deprived this petitioner of due process of law, and this Honorable Court should see that his Constitutional rights are not taken from him.

The common law writ of error coram nobis is recognized in Alabama. Johnson v. Williams, 244 Ala. 391, appears to be the first case so holding, but several cases have followed, including Ex Parte Lee, 27 So. 2d, 147. The decision of the Alabama Supreme Court in this case holds the procedure to be proper, but attacks the substantiality of petitioner's claim, even though it is backed by the Lunacy Commission, Alabama's legally constituted authority to determine the question, the report of the sheriff of the County, the report of the superintendent of the Alabama State Hospital for the Insane, and even the report of the trial judge himself.

We call the Court's attention to Adler v. State, 35 Ark. 517, holding that there is no remedy except by writ of error coram nobis, where the term at which the judgment of conviction was rendered had closed and it was not within the power of the Circuit Judge to set aside the judgment, on motion, on the ground that the defendant was insane when tried. Hydrick V. State, 104 Ark. 43, also holds this is the proper remedy in order that the question of defendant's sanity at the time of trial might be investigated, when judgment of conviction had been affirmed.

> "Matters properly presented for writ of error coram nobis are such as would have prevented conviction and not such as may have caused a different result."
>
> Chesser v. State, 92 Fla. 754, 109 So. 906.

In Hawie v. State, 83 So. 158, 121 Miss. 197, it is stated that the appellant, who had been convicted of murder, petitioned for a writ of error coram nobis, alleging that he was insane at the time he was placed on trial, and because of his mental incapacity, was unable to advise with his counsel or make his defense. On appeal from an order sustaining a demurrer to his petition, the Court held that, there being no remedy by appeal, the writ of error coram nobis was the proper remedy.

The Supreme Court of Alabama, however, advances the proposition that the remedy by writ of error coram nobis is not available to petitioner by reason of the fact that the record shows the trial judge knew of the matters alleged in the petition at the time of the trial. (If so, he was under a legal duty to defendant to stop the trial and inquire into his sanity). We are clear in our belief that a fundamental and Constitutional right of the petitioner has been violated, for which he should have some remedy. The prayer of the petition to the Supreme Court of Alabama asked for "such

other, further, general or special relief as may, unto the Court, seem meet and proper". The petition further alleged that petitioner was being "illegally deprived of his liberty and restrained in the State Penitentiary at Kilby Prison, in the custody of Warden R. P. Williams." This was a prayer, in the alternative, for the issuance of a writ of habeas corpus, if petitioner were mistaken in his remedy.

Article 6, Sec. 140 of the Constitution of Alabama, provides that: "The Supreme Court shall have power to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdiction". We believe that the writ of error coram nobis was the proper remedy, but were more concerned with the end obtained than with the means employed. We asked the Supreme Court of Alabama, if we had the wrong vehicle, to grant us, under its broad powers given to it by the State Constitution, as set out above, the writ of habeas corpus or such other writ or process as the Court deemed meet and proper to give petitioner the benefit of a legal trial and due process of law. This the Court also denied to petitioner.

Petitioner further contends that the failure of his counsel, in the trial court, to insist upon a sanity hearing at the time of trial, in the light of the great weight of proof of defendant's insanity, amounted to his not being properly and adequately represented by counsel at the time of his trial, and in this respect also, his trial and conviction were without due process of law. With this hearing a plain mandate of the law, under the facts in this case, his counsel not only failed to insist upon such a procedure, but allowed the trial judge to direct the issues so as to confine the matter of insanity solely and strictly to the time of the commission of the offense.

He did not object, reserve exception, or by any motion preserve this question for review by the appellate court. Whether through incompetence or gross negligence, we cannot say, but the record reveals that this all important question, to petitioner, was not insisted upon in the trial court and was not presented for review to the appellate court.

We concede that under ordinary circumstances, mistake, neglect, or incompetence of the attorney is imputed to his client who employed him, and is not ground for new trial or reversal of judgment. But an insane defendant cannot appoint an agent, employ counsel or waive any of his rights. He is helpless to protect himself and nothing can be imputed to him. It is the duty not only of counsel but of the court itself to protect his rights. Under the extraordinary facts in this case, where the holding of an inquiry into the sanity of defendant at the time of trial as provided by law would have probably altered the whole course and outcome of the trial, failure of counsel to insist upon this important and vital matter, we insist, deprived petitioner of due process of law.

Petitioner respectfully but earnestly contends that the petition, supported by the record, made out a strong case, a substantial case, more than a prima facie case, of petitioner's insanity at the time of his trial. There was humane duty and a legal duty resting upon the trial court not to put him to trial until this question was inquired into and determined. Yet, we find the judge, in effect, ruling out of the case the question of defendant's insanity at time of trial. The Supreme Court of Alabama says there is nothing in the petition to show that defendant became insane after the commission of the offense. This is in the face of the report of the lunacy commission who found him insane continuously for nine months after the commission of the offense and while he was confined in the Insane Hospital for observation

and study. We cannot by any process of reasoning reach the conclusion that because the jury found petitioner sane at the time of the commission of the offense, they would necessarily have found him sane at the time of trial, about sixteen months later, if that issue had been submitted to them. Is any certain length of time required for a man to lose his sanity? Is a report of a legally constituted commission of experts to be entirely disregarded, and a process instituted by the Legislature of Alabama for determining the sanity of a defendant to be held a vain and useless thing?

A seasonable investigation into petitioner's mental status at the time of the trial would have guaranteed his constitutional rights. Failure to make such an inquiry constituted lack of due process of law. The rights of petitioner, guaranteed to him by the Federal Constitution have been violated. The laws of all civilized people and of humanity speak out against an insane person being placed on trial. This record speaks out loudly that such has happened. We submit that the relief prayed for should have been granted.

Respectfully submitted,

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